Supreme Court, U.S.
FILED
MAY 3 1996
CLERK

(4)

No. 95-938

In the Supreme Court of the United States

OCTOBER TERM, 1995

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

YUEH-SHAIO YANG

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

DREW S. DAYS, III
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
BETH S. BRINKMANN
Assistant to the Solicitor General
THOMAS W. HUSSEY
NORAH ASCOLI SCHWARZ
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

550

QUESTION PRESENTED

Whether the Attorney General, when deciding whether to grant a discretionary waiver of deportation under Section 241(a)(1)(H) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(1)(H), may take into account acts of fraud that the alien committed before and after his fraudulent entry into the United States.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	2
Statement	2
Summary of argument	13
Argument:	
The Attorney General did not abuse her discretion by considering respondent's pattern of immigration fraud in deciding whether to grant him a waiver of deportation under Section 241(a)(1)(H) of the Immigration and Nationality Act	15
A. Section 241(a)(1)(H) commits to the discretion of the Attorney General the selection and weighing of factors to be considered in making a waiver determination	15
B. In exercising discretion under Section 241(a)(1)(H), the Board of Immigration Appeals has drawn on principles developed under other discretionary waiver provisions in the Act	23
C. The Board's general approach and its decision in this case are well within the Attorney General's broad discretion	27
Conclusion	38
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Alonzo, In re, 17 I. & N. Dec. 292 (Comm'r 1979)	25
Alquisalas v. *INS*, 61 F.3d 722 (9th Cir. 1995)	32, 33
Braun v. *INS*, 992 F.2d 1016 (9th Cir. 1993)	31
Braun-Bernal, In re, File A34 574 591 (BIA Oct. 9, 1991), rev'd, 992 F.2d 1016 (9th Cir. 1993)	26
Casem v. *INS*, 8 F.3d 700 (9th Cir. 1993)	31, 32
Casem, In re, File A38 467 077 (BIA Oct. 25, 1991), rev'd and remanded, 8 F.3d 700 (9th Cir. 1993)	26

Cases—Continued: Page

Da Silva, In re, 17 I. & N. Dec. 288 (Comm'r 1979) 25, 26
Delmundo v. *INS*, 43 F.3d 436 (9th Cir. 1994) 12, 32, 33
Delmundo, In re, File A26 717 178 (BIA July 21, 1993), rev'd and remanded, 43 F.3d 436 (9th Cir. 1994) 26
Foti v. *INS*, 375 U.S. 217 (1963) 18, 27
Hernandez-Robledo v. *INS*, 777 F.2d 536 (9th Cir. 1985) 30
INS v. *Cardoza-Fonseca*, 480 U.S. 421 (1987) 18
INS v. *Doherty*, 502 U.S. 314 (1992) 18, 27
INS v. *Errico*, 385 U.S. 214 (1966) 7, 19
INS v. *Jong Ha Wang*, 450 U.S. 139 (1981) ... 18, 27, 28
INS v. *Rios-Pineda*, 471 U.S. 444 (1985) 18
Jay v. *Boyd*, 351 U.S. 345 (1956) 18, 28
Kungys v. *United States*, 485 U.S. 759 (1988) 36
Liwanag v. *INS*, 872 F.2d 685 (5th Cir. 1989) 8, 30
Manchisi, In re, 12 I. & N. Dec. 132 (BIA 1967) 36
Marin, In re, 16 I. & N. Dec. 581 (BIA 1978) 11, 23-24, 27
Reid v. *INS*, 420 U.S. 619 (1975) 20, 21
Rodriguez-Barajas v. *INS*, 992 F.2d 94 (7th Cir. 1993) 24, 29, 30
Schneiderman v. *United States*, 320 U.S. 118 (1943) 36
Shepard v. *NLRB*, 459 U.S. 344 (1983) 34
Sosa-Hernandez, In re, BIA Interim Dec. No. 3214 (Nov. 12, 1993) 36
Start v. *INS*, 803 F.2d 539 (1986), opinion withdrawn upon dismissal of petition for review as moot, 862 F.2d 787 (9th Cir. 1988) 11, 31
United States v. *Alaska*, 503 U.S. 569 (1992) 17, 29
United States ex rel. Kaloudis v. *Shaughnessy*, 180 F.2d 489 (2d Cir. 1950) 18

Statutes and regulations: Page

Act of Sept. 11, 1957, Pub. L. No. 85-316, § 7, 71 Stat. 640 (codified at 8 U.S.C. 1251a (1958)) 19
Act of Sept. 26, 1961, Pub. L. No. 87-301, § 16, 75 Stat. 655 (codified at 8 U.S.C. 1251(f) (1964)) 19
Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 5
§ 601(a), 104 Stat. 5067-5075 5
§ 601(e)(1), 104 Stat. 5077 6
§ 602(a), 104 Stat. 5077-5081 5
§ 602(a), 104 Stat. 5079 ..... 5, 7, 23
§ 602(b)(1), 104 Stat. 5081 ..... 7, 23
§ 602(d), 104 Stat. 5082 5
Immigration and Nationality Act, ch. 477, § 241(c), 66 Stat. 208 19
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*:
§ 106, 8 U.S.C. 1105a 27
§ 212, 8 U.S.C. 1182 (1988)..... 2, 16, 6a
§ 212, 8 U.S.C. 1182 ..... 2, 16, 21, 1a
§ 212(a), 8 U.S.C. 1182(a) (1988) 5, 6a
§ 212(a)(5), 8 U.S.C. 1182(a)(5) 6, 1a
§ 212(a)(5)(A), 8 U.S.C. 1182(a)(5)(A) 2, 1a
§ 212(a)(6)(C), 8 U.S.C. 1182(a)(6)(C) 2, 1a
§ 212(a)(6)(C)(i), 8 U.S.C. 1182(a)(6)(C)(i) 6, 16, 2a
§ 212(a)(7)(A), 8 U.S.C. 1182(a)(7)(A) 2, 6, 3a
§ 212(a)(14), 8 U.S.C. 1182(a)(14) (1988) 2, 5, 6, 7a
§ 212(a)(19), 8 U.S.C. 1182(a)(19) (1988) .. 2, 6, 16, 7a
§ 212(a)(20), 8 U.S.C. 1182(a)(20) (1988) 2, 5, 6, 7a
§ 212(c), 8 U.S.C. 1182(c) 11, 24, 34
§ 212(*i*), 8 U.S.C. 1182(*i*) (1964) 19-20
§ 212(*i*), 8 U.S.C. 1182(*i*) (1988) 25, 26
§ 212(*i*), 8 U.S.C. 1182(*i*) 2, 14, 20, 23, 25, 26, 4a
§ 241, 8 U.S.C. 1251 ..... 2, 5, 7, 16
§ 241(a), 8 U.S.C. 1251(a) (1988) 5, 8a
§ 241(a), 8 U.S.C. 1251(a) 15, 4a
§ 241(a)(1), 8 U.S.C. 1251(a)(1) (1988)..... 2, 5, 8a

Statutes and regulations—Continued: Page

§ 241(a)(1), 8 U.S.C. 1251(a)(1) 15, 4a
§ 241(a)(1)(A), 8 U.S.C. 1251(a)(1)(A) 2, 5, 6, 5a
§ 241(a)(1)(H), 8 U.S.C. 1251(a)(1)(H) ..... *passim*, 5a
§ 241(f), 8 U.S.C. 1251(f) (1964) 19
§ 241(f), 8 U.S.C. 1251(f) (1988) 2, 6, 7, 16, 20, 21, 22, 23, 29, 9a
§ 244, 8 U.S.C. 1254 27
§ 244(a)(5), 8 U.S.C. 1254(a)(5) 18
§ 316(a), 8 U.S.C. 1427(a) 37
§ 316(d), 8 U.S.C. 1427(d) 37
§ 316(e), 8 U.S.C. 1427(e) 37
§ 340, 8 U.S.C. 1451 36

Immigration and Nationality Act Amendments of 1981, Pub. L. No. 97-116, § 8, 95 Stat. 1616 22-23

8 C.F.R.:
Section 2.1 17
Section 3.0 17
Section 3.1(a) 17
Section 3.1(b) 17
Section 3.10 17
Section 242.8 17

Miscellaneous:

Efficiency of the Immigration and Naturalization Service: Hearing on H.R. 5087 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary, 96th Cong., 1st Sess. (1979) 21, 22
H.R. 5087, 96th Cong., 1st Sess. (1979) 21
H.R. Rep. No. 1199, 85th Cong., 1st Sess. (1957) 20
H.R. Rep. No. 264, 97th Cong., 1st Sess. (1981) 20, 22, 38
S. Rep. No. 1057, 85th Cong., 1st Sess. (1957) 20

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-938

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

YUEH-SHAIO YANG

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is reported at 58 F.3d 452. The opinion of the Board of Immigration Appeals (Pet. App. 5a-11a) and the oral decision of the immigration judge (Pet. App. 12a-25a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 1995. A petition for rehearing was denied on October 5, 1995. Pet. App. 26a. The petition for a writ of certiorari was filed on December 13, 1995, and was granted on February 20, 1996. J.A. 13; 116 S. Ct. 907. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent current and former versions of Sections 212 and 241 of the Immigration and Nationality Act (8 U.S.C. 1182(a)(5)(A), (6)(C) and (7)(A), 1182(*i*), 1251(a)(1)(A) and (H); 8 U.S.C. 1182(a)(14), (19) and (20), 1251(a)(1) and (f) (1988)) are reprinted in relevant part at App., *infra*, 1a-10a.

STATEMENT

1. Respondent, Yueh-Shaio Yang, and his wife, Hai-Hsia Yang, are natives of the People's Republic of China. Pet. App. 13a. They were married in China in 1940, and they moved to Taiwan in 1945. They had six children together. *Id.* at 8a-9a, 16a.

In 1977, while in the United States as a visitor, respondent's wife was introduced by a friend to an individual who told her that, if she were single and willing to pay $60,000, she could obtain United States citizenship or permanent residency. Pet. App. 6a, 15a. As a result, respondent and his wife obtained a divorce in Taiwan, and respondent provided the $60,000 to procure United States citizenship for his wife. Respondent's wife returned to the United States in 1978, claiming to be a United States citizen based on a fraudulent U.S. birth certificate and passport in the name of Mary Wong, which were purchased with the $60,000. *Id.* at 6a-7a, 16a, 18a; see C.A. Excerpts of Record 195-196.

After he helped his wife obtain fraudulent entry to the United States under her assumed identity, respondent remarried his wife in Taiwan under that false identity. Following his remarriage, respondent fraudulently sought and, on May 24, 1978, obtained, from a United States Consulate official in Taipei, Taiwan, an immigrant visa to enter the United States

as the spouse of a citizen of the United States. See J.A. 1-4. Respondent obtained the visa based on an application he executed under oath before the United States consular officer. *Ibid.* In support of the application, respondent submitted a marriage certificate reflecting that he married Mary Wong in Taipei, Taiwan, Republic of China, and a birth certificate reflecting the birth of Mary Wong on February 25, 1931, in San Francisco, California. Resp. C.A. Br. 2. Based on the fraudulently obtained visa, respondent entered the United States at Los Angeles, California, on August 1, 1978, as a permanent resident, on the falsely claimed ground that he was married to a United States citizen. Pet. App. 7a, 16a-17a.[1]

Respondent has resided in California since his unlawful entry in 1978. He left the country on several occasions and returned each time based on his fraudulently obtained permanent resident status. See J.A. 9. Over the course of that time, respondent participated in lucrative business ventures. At the time of his deportation hearing in 1992, respondent had substantial financial assets, including "over $3

---

[1] Following respondent's fraudulent entry, he and his wife successfully petitioned for immigrant status for several of their adult children. Pet. App. 16a-17a; Admin. Rec. 239. One of those sons then attempted to bring another of respondent's daughters into the United States by purporting to marry her and have her admitted as his wife. *Ibid.* That daughter, acting with the assistance of a former examiner of the Immigration and Naturalization Service (INS), participated in additional immigration fraud by aiding others to fraudulently obtain naturalization. The daughter and the examiner were prosecuted and convicted. See Pet. App. 17a; Admin. Rec. 239. Another daughter earlier had come to the United States through her husband and his relatives and, through them, became a naturalized United States citizen. Pet. App. 17a.

million in property and real estate and liquid assets in cash, stocks, etc. of $700,000." Pet. App. 3a.

In 1982, four years after his initial fraudulent entry, respondent submitted to the Immigration and Naturalization Service (INS) an application to file a petition for naturalization. J.A. 9-12. Respondent swore to the truth of the information contained in that form. See J.A. 12. Respondent made several false statements and misrepresentations in the form. On the first page, respondent stated that his spouse was a United States citizen. He also stated that he had been lawfully admitted for permanent residence. J.A. 9. On the third page of the form, respondent stated that he married his current wife, "Mary," on May 17, 1978, in Taiwan, and that she had been born in San Francisco, California, was a citizen by birth in the United States, and had been married only one time. J.A. 11. Respondent stated that he, by contrast, had been married two times. He listed, as his previous marriage, his marriage in 1945 to Hai-Hsia Yang, and indicated that it had ended in divorce in 1977. *Ibid.* Respondent also was interviewed, in 1982, in connection with his naturalization application and, during that interview, he misrepresented that his wife was a United States citizen by birth. Resp. C.A. Br. 2.

While respondent's naturalization petition was pending, his wife decided to abandon her identity as "Mary Wong." One of respondent's daughters had lawfully become a United States citizen (see note 1, *supra*), and she filed an immediate relative petition for respondent's wife under the wife's true name. Accordingly, respondent and his wife (under the assumed name Mary Wong) obtained another divorce in 1985. The INS ultimately learned of respondent's unlawful entry by fraud in the course of other investi-

gations, including an investigation of the immigration fraud committed by respondent's children. See note 1, *supra*.

2. a. In January 1992, the INS issued respondent an order to show cause why he should not be deported, alleging that he was subject to deportation under Section 241(a)(1)(A) of the Immigration and Nationality Act (INA or Act), 8 U.S.C. 1251(a)(1)(A), because he was excludable from the United States at the time of his entry.[2] Specifically, the INS alleged that, at the time of his entry, respondent had been excludable under Section 212(a)(14) of the Act, 8 U.S.C. 1182(a)(14) (1988), because he had sought to enter for purposes of working but did not have the required certification from the Secretary of Labor, and under Section 212(a)(20) of the Act, 8 U.S.C. 1182(a)(20) (1988), because respondent did not possess the requisite valid visa or other entry document.[3] See J.A. 1-6.

---

[2] Prior to the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, Section 241(a) of the INA listed 20 categories of deportable aliens. See 8 U.S.C. 1251(a) (1988). The 1990 Act consolidated those categories into five broader categories. § 602(a), 104 Stat. 5077-5081. The provision identifying excludable aliens as deportable, which is now found at Section 241(a)(1)(A) of the Act, 8 U.S.C. 1251(a)(1)(A), was formerly Section 241(a)(1), 8 U.S.C. 1251(a)(1) (1988). The version of Section 241 enacted in 1990 applies to deportation proceedings, such as respondent's, for which notice was provided to the alien on or after March 1, 1991. See Immigration Act of 1990, § 602(d), 104 Stat. 5082.

[3] Prior to the Immigration Act of 1990, Section 212(a) of the INA listed 33 categories of excludable aliens. See 8 U.S.C. 1182(a) (1988). The 1990 Act consolidated those categories into nine broader categories. § 601(a), 104 Stat. 5067-5075. The former version applies to individuals, such as respondent, who

Respondent's case proceeded to a hearing before an immigration judge. At the hearing, the INS lodged a third charge of deportability against respondent, alleging that he was subject to deportation under Section 241(a)(1)(A) of the INA because he was excludable at the time of his entry to the United States under Section 212(a)(19) of the Act, 8 U.S.C. 1182(a)(19) (1988), on the ground that he had procured a visa or other documentation by fraud or by willfully misrepresenting a material fact. Pet. App. 5a, 13a; see J.A. 7-8.[4] Respondent conceded that he was deportable, and admitted all the allegations against him. Pet. App. 13a; Resp. C.A. Br. 3.

Respondent filed a request for a waiver of deportation under Section 241(a)(1)(H) of the Act, 8 U.S.C. 1251(a)(1)(H). Pet. App. 13a.[5] Section 241(a)(1)(H)

---

entered the United States before June 1, 1991. See Immigration Act of 1990, § 601(e)(1), 104 Stat. 5077.

The provision excluding aliens who seek to enter the United States without the required certificate from the Secretary of Labor is now found at Section 212(a)(5) of the Act, 8 U.S.C. 1182(a)(5), but was formerly Section 212(a)(14), 8 U.S.C. 1182(a)(14) (1988). The provision excluding aliens who do not possess a valid immigrant visa or other required entry or travel document is now found at Section 212(a)(7)(A) of the Act, 8 U.S.C. 1182(a)(7)(A), but was formerly Section 212(a)(20), 8 U.S.C. 1182(a)(20) (1988).

[4] The provision excluding aliens who procure a visa, other documentation, or entry by fraud or misrepresentation is now found at Section 212(a)(6)(C)(i) of the Act, 8 U.S.C. 1182(a)(6)(C)(i), but was formerly Section 212(a)(19), 8 U.S.C. 1182(a)(19) (1988). As noted above, see note 3, *supra*, the version in effect prior to 1990 applies to respondent.

[5] The relief now available under Section 241(a)(1)(H) was previously available under Section 241(f), 8 U.S.C. 1251(f) (1988). Section 241(a)(1)(H) was enacted as part of the Im-

provides that the Act's provision for deportation of an alien who was excludable at the time of entry due to fraud or misrepresentation may be waived, "in the discretion of the Attorney General," for

> any alien (other than an alien described in paragraph (4)(D) [relating to certain aliens who assisted in Nazi persecution or engaged in genocide]) who—
>
> (i) is the spouse, parent, son, or daughter of a citizen of the United States or of an alien lawfully admitted to the United States for permanent residence; and
>
> (ii) was in possession of an immigrant visa or equivalent document and was otherwise admissible to the United States at the time of such entry except for those grounds of inadmissibility specified under paragraphs (5)(A) and (7)(A) of section 1182(a) of this title [relating to possession of valid labor certifications and immigrant visas, respectively] which were a direct result of that fraud or misrepresentation.

8 U.S.C. 1251(a)(1)(H).[6]

---

migration Act of 1990, §602(a), 104 Stat. 5079, to replace former Section 241(f) (repealed by Section 602(b)(1) of the 1990 Act, 104 Stat. 5081). As noted above, see note 2, *supra*, the version of Section 241 enacted in 1990 applies to respondent's deportation proceedings.

[6] Section 241(a)(1)(H) further provides that such a waiver for fraud or misrepresentation shall also operate to waive deportation based on grounds of inadmissibility at entry directly resulting from such fraud or misrepresentation. That further statutory provision codifies prior administrative practice. See *INS* v. *Errico*, 385 U.S. 214, 217 (1966).

Respondent testified at his deportation hearing. He "claimed that [he] had believed in the propriety of [his] method of entering the United States," and that he did not find it "unusual that [his] wife would adopt a different name, present another's birth certificate in order to obtain immigration benefits, or be required to obtain a sham divorce." Pet. App. 8a. Respondent also testified that he was indigent and that he was not aware of other acts of immigration fraud committed by his children until after they had been discovered by the INS. *Id.* at 8a, 23a. The INS submitted to the immigration judge a copy of the fraudulent application for naturalization as a United States citizen that respondent filed in 1982. *Id.* at 19a, 23a.

The immigration judge denied respondent's request for a waiver of deportation. Pet. App. 12a-25a. The immigration judge found that respondent was statutorily eligible for a Section 241(a)(1)(H) waiver, but concluded that he did not deserve such a waiver as a matter of discretion. *Id.* at 24a-25a.

The immigration judge detailed his reasoning, including the factors that he considered in exercising his discretion. Relying on judicial precedent that had, in turn, relied on the Attorney General's identification of what factors will be considered in determining whether to waive deportation based on fraud or misrepresentation at the time of the alien's initial entry, the immigration judge "d[id] not take into account the original fraud perpetrated against the United States Government by [respondent]; that is, * * * respondent's coming to this country and making claims falsely to be a spouse of a United States citizen." Pet. App. 14a (citing *Liwanag* v. *INS*, 872 F.2d 685, 687 (5th Cir. 1989)); see also Pet.

App. 21a. The judge pointed out, however, that a waiver under Section 241(a)(1)(H) could "be appropriately denied if an alien continues in his fraud or in other subsequent acts from the original fraud or misrepresentation." *Id.* at 14a-15a. The judge accordingly based his decision in part on respondent's additional fraudulent conduct, which included the filing of a fraudulent application for naturalization in 1982 and his attempt to obtain the benefit of United States citizenship through that fraud. *Id.* at 23a, 24a-25a.

In weighing the equities in the case to determine whether to grant the waiver of deportation, the immigration judge also considered the fact that respondent was "not * * * candid in all of his testimony and presentations to the [immigration] Court," Pet. App. 23a, including insofar as he originally claimed indigency and need for familial support. After persistent questioning by the judge, respondent admitted that he had "over $3 million in property and real estate[,] and liquid assets in cash, stocks, etc., of $700,000." *Id.* at 23a-24a. The immigration judge found that an order that respondent be deported to Taiwan would not require him to return to an unfamiliar country, because respondent had spent most of his life in Taiwan, understood the customs and language there, and had members of his immediate family living there who appeared to have substantial economic power and wealth. *Id.* at 24a. Finally, the immigration judge noted that respondent based his waiver request on the fact that he had relatives residing in the United States, but the judge did not consider that to be an equity in respondent's favor because several of those family members had obtained residence in this country through fraud. *Ibid.*

b. The Board of Immigration Appeals (Board or BIA) dismissed respondent's appeal. Pet. App. 5a-11a.[7] The Board agreed with the immigration judge that respondent "is statutorily eligible for the section 241(a)(1)(H) waiver, which may operate to excuse the initial fraud of entering the United States with an immigrant visa obtained under the auspices of his wife's fraudulent claim to citizenship." *Id.* at 9a-10a. The Board pointed out that "[t]his initial fraud was admitted by the respondent and concededly disregarded by the immigration judge in his evaluation of the merits of the respondent's application for discretionary relief." *Ibid.*

Turning to whether respondent should be granted a deportation waiver as a matter of discretion, the Board observed that, "[a]s with other discretionary applications for a waiver of deportability," Section 241(a)(1)(H) "necessitates a balancing of the alien's undesirability as a permanent resident [against] the social and humane considerations present to determine whether according him such relief is in the best

[7] The INS also issued respondent's wife an order to show cause why she should not be deported. A few months after the INS began the proceedings against respondent and his wife, they remarried again using the wife's true name. Pet. App. 7a-8a, 17a-18a. Their two cases were consolidated for presentation before the immigration judge, *id.* at 6a n.1, who denied the request for a Section 241(a)(1)(H) waiver by respondent's wife as well, *id.* at 25a. The BIA reviewed the matters simultaneously, but issued separate decisions. *Id.* at 6a n.1. During the pendency of her appeal before the Board, respondent's wife departed from the United States. The Board, accordingly, deemed her appeal withdrawn, and the decision of the immigration judge became final. Admin. Rec. 4-5. As a result, the case of respondent's wife was not before the court of appeals and is not before this Court.

interest of this country." Pet. App. 10a (citing *In re Marin*, 16 I. & N. Dec. 581 (BIA 1978) (discussing waiver of deportation under INA § 212(c), 8 U.S.C. 1182(c)). The Board found that the adverse factors in respondent's case included respondent's "acts of immigration fraud before and after his 1978 entry into the United States and his apparent lack of candor during the deportation hearing regarding his knowledge of the significance of his fraud." Pet. App. 10a. The Board found that respondent "ha[d] engaged in a pattern of violating this country's immigration laws through fraud," *ibid.*, noting respondent's first sham divorce to facilitate his wife's unlawful entry, his own unlawful entry, his fraudulent 1982 naturalization petition, and his second sham divorce to facilitate his wife's second admission to the United States (this time through an immigrant visa). The Board reasoned that, "[a]lthough the respondent's fraud in entering the United States in 1978 can be waived, his remaining acts involving fraud cannot." *Ibid.* (citing *Start* v. *INS*, 803 F.2d 539 (1986), opinion withdrawn upon dismissal of petition for review as moot, 862 F.2d 787 (9th Cir. 1988)).

The Board found that the factors weighing in respondent's favor consisted of his residence in this country for 15 years, his investment of a substantial amount of money in this country resulting in significant property and business ties, and his three children who reside in this country. Pet. App. 11a. The Board concluded, however, as did the immigration judge, that respondent did not merit relief in the exercise of discretion. The Board pointed to the fact that respondent claimed that he was no longer active in his business here, that there was no evidence that he could not receive effective medical treatment in

Taiwan for his hypertension, and that respondent previously lived in Taiwan as an adult for more than 30 years. *Ibid.* The Board also relied on the fact that one of respondent's daughters lived in Taiwan, two of his children who resided in the United States spent a large part of time outside the country, and his wife had returned to live in Taiwan. *Ibid.* The Board concluded that "the serious nature of respondent's continuing course of immigration violations, both before and after his entry in 1978, outweighs the factors in his favor," and it dismissed the appeal. *Ibid.*

3. The court of appeals granted respondent's petition for review, vacated the Board's decision, and remanded the case for further proceedings. Pet. App. 1a-4a. The court held that, in balancing the equities in this case, the Board erred by considering respondent's participation in his wife's fraudulent entry into this country, including his sham divorces and marriages, because those acts were "inextricably intertwined with [respondent's] own efforts to secure entry into the country and must be considered part of the initial fraud." *Id.* at 2a. The court also ruled that the Board improperly considered respondent's fraudulent application for naturalization as a United States citizen because, in the court's view, that application "must be considered an extension of the initial fraud." *Id.* at 2a-3a (relying on *Delmundo* v. *INS*, 43 F.3d 436, 440-441 (9th Cir. 1994)). The court recognized that the Board also had properly considered, as an adverse factor, respondent's lack of candor before the immigration judge regarding his knowledge of the immigration fraud, his claim not to have been involved in any intentional wrongdoing, and his asserted need for financial support from his children. Therefore, the Court remanded the case for a reweighing of the

equities, "considering solely as an adverse factor [respondent's] allegedly dishonest testimony before the immigration court." *Id.* at 3a-4a.

The court of appeals denied the INS's petition for rehearing, and rejected its suggestion of rehearing en banc. Pet. App. 26a.

SUMMARY OF ARGUMENT

The Attorney General did not abuse her discretion by considering, through her delegates the Board of Immigration Appeals (Board or BIA) and the immigration judge, respondent's acts of fraud and misrepresentation, both prior to and subsequent to his fraudulent entry, in deciding whether to grant respondent a waiver of deportation under Section 241(a)(1)(H) of the Immigration and Nationality Act (INA or Act), 8 U.S.C. 1251(a)(1)(H). Section 241(a)(1)(H) permits a waiver of deportation in certain cases where the alien is deportable because of excludability based on fraud or misrepresentation at the time of his initial entry and the alien is an immediate relative of a United States citizen or lawful resident alien. The Act commits to the discretion of the Attorney General the selection and weighing of factors to be considered in making that waiver determination. Section 241(a)(1)(H) requires that an alien meet three threshold requirements to be eligible for a waiver, but places no restrictions on the factors that may be considered by the Attorney General in exercising her discretion whether to grant a waiver to any particular eligible alien. This grant of unfettered discretion to the Attorney General under the INA is consistent with the authority granted the Attorney General under other provisions of the Act, authority that this Court

correctly has likened to the executive's power to pardon.

The history of Section 241(a)(1)(H) confirms that Congress intended to vest the Attorney General with sole discretion to determine which cases of initial-entry fraud merit a waiver of deportation. The earlier version of the statute did not provide for a discretionary waiver, but rather established a blanket exemption from deportation for all aliens who met the statutory eligibility requirements. In 1981, Congress rejected a proposal to abolish the waiver altogether and, in accordance with the request of the Department of Justice, it instead transformed that mandatory exemption into a waiver to be granted in the discretion of the Attorney General.

In exercising her authority under Section 241(a)(1)(H), the Attorney General, through her delegate the BIA, follows an approach similar to the approach she follows under other provisions of the INA that grant her similar discretion. The Board balances the alien's undesirability as a permanent resident against the relevant humane considerations to determine whether granting him or her a waiver is in the country's best interests. The Board has chosen not to weigh the initial-entry fraud as an adverse factor when deciding whether to grant a deportation waiver under Section 241(a)(1)(H). The Board does, however, consider as an adverse factor other fraud or misrepresentation in which the alien has engaged. That approach is based on earlier decisions by the Immigration and Naturalization Service that, in determining whether to grant a discretionary waiver of exclusion under Section 212(*i*) of the Act, 8 U.S.C. 1182(*i*), to aliens who had committed fraud, the initial fraud should not be weighed as an adverse factor

because that was the act for which the alien sought forgiveness through the waiver. Accordingly, the Board acted well within its discretion in adopting its initial-entry-fraud approach in making waiver determinations under Section 241(a)(1)(H) and did not abuse its discretion by application of that principle in this case. The Board properly weighed as adverse factors in the instant case respondent's continuing pattern of violating this country's immigration laws, including the fact that respondent submitted a fraudulent application for naturalization.

ARGUMENT

THE ATTORNEY GENERAL DID NOT ABUSE HER DISCRETION BY CONSIDERING RESPONDENT'S PATTERN OF IMMIGRATION FRAUD IN DECIDING WHETHER TO GRANT HIM A WAIVER OF DEPORTATION UNDER SECTION 241(a)(1)(H) OF THE IMMIGRATION AND NATIONALITY ACT

A. Section 241(a)(1)(H) Commits To The Discretion Of The Attorney General The Selection And Weighing Of Factors To Be Considered In Making A Waiver Determination

1. Section 241(a) of the Immigration and Nationality Act (INA or Act) provides that any alien who falls within one or more of several statutory categories "shall, upon the order of the Attorney General, be deported." 8 U.S.C. 1251(a). The first statutory category of aliens subject to deportation includes all aliens who were excludable at the time they entered the United States. 8 U.S.C. 1251(a)(1). Whether an alien was excludable at the time of entry depends on whether, at that time, the alien fell within one or more of several different categories set forth

in Section 212 of the Act, 8 U.S.C. 1182, including aliens who procured visas, other documents, or entry into the United States by fraud or misrepresentation. See INA § 212(a)(19), 8 U.S.C. 1182(a)(19) (1988) (now found at INA § 212(a)(6)(C)(i), 8 U.S.C. 1182(a)(6)(C)(i)).[8]

Hence, an alien in the United States who procured his initial entry into this country by fraud or willful misrepresentation is subject to deportation when the deception is discovered. Section 241(a)(1)(H) of the Act (formerly Section 241(f)),[9] however, permits the Attorney General to grant such an alien a waiver of deportation if the alien meets certain requirements. Specifically, Section 241(a)(1)(H) provides that deportation based on excludability because of fraud or misrepresentation at the time of entry may be waived, "in the discretion of the Attorney General," if (1) the alien is the spouse, parent, or child of a citizen or lawful resident alien; (2) the alien was in possession of an immigrant visa or equivalent document (regardless of its validity, but indicative of the fact that the alien submitted himself or herself for inspection) at the time of entry; and (3) the alien, at the time of entry, was eligible (aside from the fraud or misrepresentation) for admission to the United States. See 8 U.S.C. 1251(a)(1)(H).

The three statutory eligibility requirements constitute the only conditions imposed by Congress on the authority vested in the Attorney General under Section 241(a)(1)(H). Significantly, moreover, the

[8] The earlier version of Section 212 applies to respondent because he entered before June 1, 1991. See note 3, *supra*.

[9] The current version of Section 241 applies to respondent's deportation proceedings. See note 2, *supra*.

statutory text places no restrictions on the factors that may be considered by the Attorney General and her delegates[10] in exercising her discretion whether to grant a waiver of deportation under Section 241(a)(1)(H) if the three statutory conditions of eligibility for such a waiver are satisfied. Thus, Section 241(a)(1)(H), on its face, vests the Attorney General with essentially unfettered discretion to grant or withhold relief from deportation to an eligible alien. Compare *United States* v. *Alaska*, 503 U.S. 569, 576 (1992) ("The statute itself [Section 10 of the Rivers and Harbors Appropriation Act of 1899] contains no criteria by which the Secretary is to make an authorization decision; on its face, the provision appears to give the Secretary unlimited discretion to grant or deny a permit.").

This understanding of Section 241(a)(1)(H) is consistent with the pattern of the INA as a whole regarding the discretionary authority of the Attorney General. For example, this Court explained with regard to the Attorney General's similar authority to suspend deportation under Section 244(a)(5) of the Act, 8 U.S.C. 1254(a)(5):

> Congress has provided a general plan dealing with the deportation of those aliens who have not obtained citizenship although admitted to residence. Since it could not readily make exception

[10] The Attorney General has delegated her authority to direct the administration of the INS and to enforce the INA and other laws relating to the immigration and naturalization of aliens to the Commissioner of the INS, 8 C.F.R. 2.1, and the Executive Office for Immigration Review, which includes the Board of Immigration Appeals, 8 C.F.R. 3.0, 3.1(a) and (b), and immigration judges, 8 C.F.R. 3.10, 242.8.

> for cases of unusual hardship or extenuating circumstances, those matters were left to the consideration and discretion of the Attorney General.

Jay v. *Boyd*, 351 U.S. 345, 361 (1956). In *Jay* v. *Boyd* and other decisions, the Court has repeatedly emphasized the breadth of the Attorney General's discretion in granting relief under the INA. See *id.* at 354 ("Although such aliens have been given a right to a discretionary determination on an application for suspension, a grant thereof is manifestly not a matter of right under any circumstances, but rather is in all cases a matter of grace.") (citation omitted); *id.* at 357-358 ("suspension of deportation is * * * dispensed according to the unfettered discretion of the Attorney General"); *Foti* v. *INS*, 375 U.S. 217, 222 n.7 (1963) (expressly reaffirming *Jay* v. *Boyd*'s description of the Attorney General's discretion); *INS* v. *Jong Ha Wang*, 450 U.S. 139, 144-146 (1981) (per curiam); *INS* v. *Rios-Pineda*, 471 U.S. 444, 450-452 (1985); *INS* v. *Doherty*, 502 U.S. 314, 323-324 (1992); *id.* at 331, 333-334 (Scalia, J., concurring in the judgment in part and dissenting in part); see also *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 444-445 (1987). Indeed, the Court has likened the discretion of the Attorney General with respect to suspension of deportation to "a judge's power to suspend the execution of a sentence, or the President's to pardon a convict." *Jay* v. *Boyd*, 351 U.S. at 354 n.16 (quoting *United States ex rel. Kaloudis* v. *Shaughnessy*, 180 F.2d 489, 491 (2d Cir. 1950) (Hand, J.)). The Attorney General's authority to forgive fraud or misrepresentations at the time of entry should be viewed in the same light, as essentially a power of pardon and dispensation

exercised as a "matter of grace," according to the Attorney General's "unfettered discretion."

2. The history and background of Section 241(a)(1)(H) confirm that Congress intended to grant the Attorney General broad discretion to determine which cases of initial-entry fraud merit a waiver of deportation.

a. As originally enacted in 1952, the Immigration and Nationality Act did not provide for a waiver of deportation for aliens who were excludable because they entered by fraud. See ch. 477, § 241(c), 66 Stat. 208. In 1957, however, Congress added a provision that mandated a waiver for an alien within the United States who had entered by fraud or misrepresentation but was otherwise admissible at the time of entry, if the alien was a spouse, parent, or child of a United States citizen or lawfully admitted permanent resident. Act of Sept. 11, 1957, Pub. L. No. 85-316, § 7, 71 Stat. 640 (codified at 8 U.S.C. 1251a (1958)). That mandatory deportation waiver was reenacted in 1961 as Section 241(f) of the INA. Act of Sept. 26, 1961, Pub. L. No. 87-301, § 16, 75 Stat. 655 (codified at 8 U.S.C. 1251(f) (1964)); see *INS* v. *Errico*, 385 U.S. 214, 220-223 (1966).

Both the 1957 and 1961 Acts also provided that exclusion of an alien could be waived in similar circumstances (*i.e.*, where exclusion normally would have been required due to fraud or misrepresentation by an alien attempting to enter) for certain similarly situated aliens outside the United States. The waiver of exclusion was not mandatory, however, but was instead committed to the discretion of the Attorney General. See 8 U.S.C. 1251a (1958); 8 U.S.C. 1182(*i*)

(1964); H.R. Rep. No. 1199, 85th Cong., 1st Sess. 10-11 (1957); S. Rep. No. 1057, 85th Cong., 1st Sess. 5 (1957). The waiver of exclusion remains discretionary today, as set forth in Section 212(*i*) of the Act, 8 U.S.C. 1182(*i*).

b. Over the course of the 20 years following the enactment of Section 241(f), its mandatory waiver of deportation became "a major source of controversy and litigation." H.R. Rep. No. 264, 97th Cong., 1st Sess. 25 (1981). As early as 1973, Congress was informed by the Department of Justice that "litigants ha[d] sought to expand section 241(f) into a charter of amnesty, waiving all restrictions for those who had entered the United States through fraud." *Ibid.* By 1975, this Court observed that decisions of the lower courts under Section 241(f) might be "summarized in the language of Macduff: 'Confusion now hath made his masterpiece.'" *Reid* v. *INS*, 420 U.S. 619, 628 (1975).[11]

---

[11] The *Reid* Court described some of the confusion that had arisen under Section 241(f):

> Aliens entering the United States under temporary visitor permits, who acquire one of the specified familial relationships described in § 241(f) after entry, have argued with varying results that their fraudulent intent upon entry to remain in this country permanently cloaks them with immunity from deportation even though they overstayed their visitor permits. Acceptance of this theory leads to the conclusion that § 241(f) waives a substantive ground for deportation based on overstay if the alien can affirmatively prove his fraudulent intent at the time of entry, but grants no relief to aliens with exactly the same familial relationship who are unable to satisfactorily establish their dishonesty. Balking at such an irrational result, one court has gone so far as to declare that § 241(f) waives deportability under § 241(a)(1) even though no fraud is involved if the alien is able merely to establish the requisite familial tie.
>
> Nor has there been agreement among those courts which have construed § 241(f) to waive substantive grounds for deportation under § 212 other than for fraud delineated in § 212(a)(19) as to which other grounds are waived.

420 U.S. at 628-629 (footnote and citations omitted). The *Reid* Court also noted that the waiver had been "designed primarily to prevent the deportation of refugees from totalitarian nations for harmless misrepresentations made solely to escape persecution," and was not intended "to arm the dishonest alien seeking admission to our country with a sword by which he could avoid the numerous substantive grounds for exclusion unrelated to fraud" set forth in Section 212 of the Act. *Id.* at 630-631 & n.8.

In 1979, a bill was introduced in Congress that, among other things, would have eliminated Section 241(f) altogether. See H.R. 5087, 96th Cong., 1st Sess. At a congressional hearing that same year, the Acting Commissioner of INS testified that the Department of Justice favored enactment of the bill except for two provisions, one of which was the proposed elimination of Section 241(f). *Efficiency of the Immigration and Naturalization Service: Hearing on H.R. 5087 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 4, 7 (1979). He acknowledged that Section 241(f) was creating problems, emphasizing that "[t]he issue of the proper interpretation of [Section 241(f)] ha[d] reached the Supreme Court twice [in *Errico* and *Reid*, *supra*] with no clear resolution, and differing administrative and judicial interpretations ha[d] left the law in a state of confusion which ma[de] it virtu-

ally impossible for the INS to uniformly administer" the waiver. *Id.* at 4. The Acting Commissioner urged Congress not to eliminate the provision, however, but instead to clarify it and to "make the waiver discretionary with the Attorney General." *Ibid.* He emphasized that the Department of Justice's approach was "preferable to the elimination of section 241(f) because it allows the INS to consider relief in cases where the misrepresentation may be outweighed by family ties." *Id.* at 4, 7-8.

The House Committee revised the bill consistent with the suggestion of the Department of Justice. The House Judiciary Committee's Report accompanying the revised bill echoed the hearing testimony by the Acting Commissioner of INS regarding the controversy created by the then extant version of Section 241(f). See H.R. Rep. No. 264, *supra*, at 25. The Committee explained that the "original intent of the section was simply to waive relatively minor grounds for deportation—those arising out of misrepresentations in arranging entry—for aliens with a close family relative who was a United States citizen or lawful permanent resident." *Ibid.* The Committee recognized that the scope of the waiver had become increasingly unclear and had led to litigation, and it accordingly recommended that the statutory language be clarified in certain respects and that the waiver be made discretionary with the Attorney General rather than mandatory. *Ibid.* Those changes, the Committee concluded, "should obviate the need for further litigation, and promote the uniform administration of this section." *Ibid.* Section 241(f) was amended by Congress in the manner proposed by the House Judiciary Committee, see Immigration and Nationality Act Amendments of

1981, Pub. L. No. 97-116, § 8, 95 Stat. 1616, thereby conforming it to the discretionary waiver of *exclusion* under Section 212(*i*) of the Act, 8 U.S.C. 1182(*i*), based on fraud or misrepresentation. See pages 19-20, *supra*.

When the INA was revised in 1990, Section 241(f) was repealed and replaced by Section 241(a)(1)(H) of the INA, 8 U.S.C. 1251(a)(1)(H). Immigration Act of 1990, Pub. L. No. 101-649, § 602(a) and (b)(1), 104 Stat. 5079, 5081. The revised version of the provision does not vary in relevant respects from the measure Congress enacted in 1981 to eliminate confusion and promote uniform administration by the Attorney General, and it likewise contains no limitations on the Attorney General's exercise of her discretion to grant or deny a waiver to eligible aliens.

Thus, the legislative evolution of Section 241(a)(1)(H) strongly reinforces the plain import of the statutory text as conferring broad discretion on the Attorney General.

B. In Exercising Discretion Under Section 241(a)(1)(H), The Board Of Immigration Appeals Has Drawn On Principles Developed Under Other Discretionary Waiver Provisions In The Act

In implementing the broad authority vested in the Attorney General by Section 241(a)(1)(H), the BIA has followed an approach similar to the one it takes under other sections of the INA that provide for a discretionary waiver of deportation. See Pet. App. 10a. The Board's practice calls for "a balancing of the alien's undesirability as a permanent resident [against] the social and humane considerations present to determine whether according him such relief is in the best interest of this country." Pet. App. 10a (citing *In re Marin*, 16 I. & N. Dec. 581 (BIA

1978) (discussing discretionary waiver of deportation under INA § 212(c), 8 U.S.C. 1182(c)). In this case, the BIA did not treat respondent's fraud in entering the United States in 1978 as an adverse factor in the balance of positive and negative considerations. Pet. App. 10a. But it did treat as adverse factors respondent's other "acts of immigration fraud before and after his 1978 entry into the United States," including participation in his wife's illegal immigration, two sham divorces, an intervening remarriage under a false name, and his "apparent lack of candor during the deportation hearing regarding his knowledge of the significance of his fraud." *Ibid.* The BIA concluded that this "pattern of violating this country's immigration laws through fraud" outweighed respondent's positive equities. *Id.* at 10a-11a.

The BIA's identification of the factors it would weigh in this case was consistent with its practice in similar cases over the years. Under the unqualified language of Section 241(a)(1)(H) and its predecessor, the Attorney General would be fully justified in considering (along with other positive and negative factors) the nature and gravity of the initial fraud or misrepresentation at the time of entry, which renders the alien deportable in the first place and is the subject of the waiver. See *Rodriguez-Barajas* v. *INS*, 992 F.2d 94, 97 (7th Cir. 1993). But the BIA has to date adopted a more lenient policy. The BIA has concluded that the fraud or misrepresentation at the time of the alien's entry will not be included in the otherwise comprehensive balancing of factors it deems relevant to the waiver determination. The BIA has not, however, chosen to extend that leniency to any other fraud or misrepresentation, whether occurring before or after the alien's initial entry.

The BIA based its approach to discretionary waivers of deportation under the 1981 amendments on its pre-1981 practice with regard to discretionary waivers of exclusion under the parallel provision in Section 212(*i*) of the Act.[12] Section 212(*i*) permits the Attorney General to waive exclusion in circumstances similar to those required for a waiver of deportation under current Section 241(a)(1)(H). In 1979, the Attorney General, acting through the Commissioner of INS, concluded that, in determining whether to grant a discretionary waiver of exclusion under Section 212(*i*), the initial fraud that renders an alien excludable "is the action for which [the alien] seek[s] to be forgiven and should not be held as an adverse factor." *In re Alonzo*, 17 I. & N. Dec. 292, 294 (1979); see also *In re Da Silva*, 17 I. & N. Dec. 288, 290 (1979) ("While the initial fraud is obviously adverse, this is the action for which [the alien] asks to be forgiven.").[13] At the same time, the INS

---

[12] As pointed out above (see pages 19-20, *supra*), a waiver of exclusion under what is now Section 212(*i*) has been committed to the discretion of the Attorney General since 1957, long before the waiver of deportation under what is now Section 241(a)(1)(H) was made discretionary in 1981.

[13] At that time, Section 212(*i*) provided:

> Any alien who is the spouse, parent, or child of a United States citizen or of an alien lawfully admitted for permanent residence and who is excludable because (1) he seeks, has sought to procure, or has procured, a visa or other documentation, or entry into the United States, by fraud or misrepresentation, or (2) he admits the commission of perjury in connection therewith, may be granted a visa and admitted to the United States for permanent residence, if otherwise admissible, if the Attorney General in his discretion has consented to the alien's applying

Commissioner made clear that other fraudulent acts or misrepresentations by the alien would not be ignored when making a discretionary waiver determination. See *In re Da Silva*, 17 I. & N. Dec. at 290 (indicating that the alien's alleged misrepresentation regarding his wife's pregnancy could have been properly considered as an adverse factor, "evidenc[ing] a continued pattern of fraud," if it had been left unexplained, but concluding that the alien's statement was not adverse in light of satisfactory innocent explanation for it).

When the deportation-waiver provision was transformed into a similarly discretionary measure in 1981, the BIA decided that it would follow the *Alonzo* approach with regard to waivers of deportation. See, *e.g.*, *In re Delmundo*, File A26 717 178 (BIA July 21, 1993), slip op. 3, rev'd and remanded, 43 F.3d 436 (9th Cir. 1994); see also *In re Braun-Bernal*, File A34 574 591 (BIA Oct. 9, 1991), slip op. 5-6, rev'd, 992 F.2d 1016 (9th Cir. 1993); *In re Casem*, File A38 467 077 (BIA Oct. 25, 1991), slip op. 4, rev'd and remanded, 8 F.3d 700 (9th Cir. 1993).

Thus, the BIA drew on long-standing practice under similarly discretionary waiver provisions in choosing under Section 241(a)(1)(H) to engage in a general "balancing of the alien's undesirability as a permanent resident [against] the social and humane considerations present" (Pet. App. 10a, citing *In re Marin*, *supra*) and eliminating from that balance only

---

or reapplying for a visa and for admission to the United States.

8 U.S.C. 1182(*i*) (1988). The current version of Section 212(*i*) is set forth at App., *infra*, 4a.

the fraud or misrepresentation committed by the alien as part of his or her initial entry.

C. The Board's General Approach And Its Decision In This Case Are Well Within The Attorney General's Broad Discretion

The decision by the Attorney General or her delegate not to grant a waiver of deportation under Section 241(a)(1)(H), like other denials of discretionary relief in administrative deportation proceedings, may be reviewed by a court of appeals under 8 U.S.C. 1105a only for abuse of discretion. *Foti* v. *INS*, 375 U.S. at 228-229; *INS* v. *Doherty*, 502 U.S. at 323-324; *id.* at 330 (Scalia, J., concurring in the judgment in part and dissenting in part); see also Resp. C.A. Br. 2, 3, 6. The BIA plainly did not abuse its discretion in denying the application for a waiver of deportation in this case. Contrary to the Ninth Circuit's view, the BIA was not required to ignore respondent's pattern of violating the Nation's immigration laws on the ground that it was a mere "extension" of his fraudulent entry. See Pet. App. 2a-3a. The court of appeals had no authority to broaden the circumstances in which the Attorney General has determined that a waiver of deportation is appropriate.

1. In similar circumstances in the past, this Court has emphasized the substantial deference due the Attorney General's interpretation and administration of the INA. In *INS* v. *Jong Ha Wang*, 450 U.S. 139 (1981) (per curiam), the Court was faced with two interpretations of the "extreme hardship" showing that must be made by an alien in order to be eligible for suspension of deportation under Section 244 of the Act, 8 U.S.C. 1254. The BIA's narrow interpretation required a showing beyond economic detriment and loss of educational opportunity to the alien's children.

The Ninth Circuit adopted a more expansive interpretation (based on its view that the Act should be liberally construed), under which those considerations would have constituted a prima facie showing of eligibility. 450 U.S. at 142-143. This Court reversed the Ninth Circuit's decision, emphasizing that the court of appeals "fundamentally" erred because it "improvidently encroached on the authority which the Act confers on the Attorney General and his delegates." *Id.* at 144. The Court noted that the statutory terms "extreme hardship" were not self-explanatory and that the Act commits their definition in the first instance to the Attorney General. The Court accordingly held that the Attorney General's reasonable interpretation "should not be overturned by a reviewing court simply because it may prefer another interpretation of the statute." *Ibid.* Rejecting the Ninth Circuit's attempt to broaden the Board's approach, the Court stressed that "[t]he Attorney General and his delegates have the authority to construe 'extreme hardship' narrowly should they deem it wise to do so." *Id.* at 145.

It follows *a fortiori* from *Wang* that the Court should reject the Ninth Circuit's attempt to broaden the Board's already lenient treatment of initial-entry fraud when deciding whether to grant a waiver of deportation under Section 241(a)(1)(H). For what is at issue here is not the Attorney General's interpretation of a provision of the INA itself, as in *Wang*, but her identification and weighing of the factors she deems relevant in the exercise of authority that is committed to her discretion. See *Jay* v. *Boyd*, 351 U.S. at 353-354. A reviewing court may not substitute its judgment for that of the Attorney General with respect to what factors should be deemed relevant (and what weight to attach to those factors) in the exercise of her discretion under Section 241(a)(1)(H). Compare *United States* v. *Alaska*, 503 U.S. at 585 ("the Secretary has the discretion to identify relevant considerations for issuing or denying a permit") (citing *Jay* v. *Boyd*, 351 U.S. at 353-354).

2. Other courts of appeals have properly adhered to these principles in reviewing the Attorney General's exercise of her discretion to deny a waiver of deportation. In *Rodriguez-Barajas* v. *INS*, 992 F.2d 94 (1993), the Seventh Circuit correctly recognized that the Attorney General is under no compulsion to disregard the nature and severity even of an alien's initial-entry fraud in considering whether to grant a waiver of deportation under then-Section 241(f) (now Section 241(a)(1)(H)). 992 F.2d at 97. Rather, the Seventh Circuit continued, any limitations the Attorney General may observe concerning what misconduct by an alien will be considered in making waiver determinations under Section 241(a)(1)(H) arise from her exercise of discretion, and not from any requirement of the Act. See *id.* at 97. That conclusion followed, in the court's view, from the fundamental rule of deference to a reasonable exercise of discretion under the INA by the Attorney General:

> Discretion is not compulsion. The Attorney General has a choice to make, and courts review discretionary choices under the immigration laws with great deference. E.g., *INS v. Elias-Zacarias*, [502 U.S. 478, 485] (1992); *INS v. Jong Ha Wang*, 450 U.S. 139, 144-45 (1981); *Achacoso-Sanchez v. INS*, 779 F.2d 1260, 1265 (7th Cir. 1985). * * * [T]he Attorney General exercises a

> delegated power. What sort of standard to use (strict versus lenient) and how to apply it to individual aliens are in her hands. The judicial role lies in policing the boundaries of the statutory delegation and in assuring that discretion within the scope of that delegation is exercised in a reasoned way.

Id. at 96 (parallel citations omitted).

Similarly, in *Liwanag* v. *INS*, 872 F.2d 685 (1989), the Fifth Circuit found no abuse of discretion where the BIA weighed as adverse factors several misrepresentations by the alien, including undertaking a second marriage to his wife, filing an immigrant visa petition on her behalf, and lying to an INS officer about their marriage. The court accorded deference to the BIA's treatment of those acts as separate from the alien's claim at the time of his initial entry that he was not married. *Id.* at 687-688.

Initially, the Ninth Circuit likewise accorded appropriate deference to the Attorney General's exercise of her discretion in identifying and weighing what she deems to be relevant acts of misconduct by aliens. In *Hernandez-Robledo* v. *INS*, 777 F.2d 536, 541 (9th Cir. 1985), the court recognized that the BIA had "noted the 'serious incident' of [the alien's] misrepresentation that he was married * * * to obtain a visa," and the court approved the BIA's citation of that factor, observing that it was "a discretionary consideration since section 241(f)(1) may serve to forgive this ground as one for deportation." In *Start* v. *INS*, *supra*, the Ninth Circuit noted the INS's concession that the alien's initial-entry fraud should not be deemed an adverse factor when determining whether to exercise discretion to grant a waiver, but

it approved the BIA's consideration of other acts of fraud and misrepresentation by the alien, including his second marriage to the wife that he had fraudulently denied at the time of entry, in order to allow her and her children to immigrate to the United States. 803 F.2d at 542. The Ninth Circuit expressly rejected the alien's argument that he had committed only "a single, continuous fraud," and held that "the BIA did not abuse its discretion by concluding that [the alien] committed multiple frauds." *Ibid.*[14]

The Ninth Circuit began to change course, however, in *Casem* v. *INS*, 8 F.3d 700 (1993). There, in reversing the BIA's decision on other grounds and remanding the case to the BIA, the court directed the BIA to note that the court had withdrawn its opinion in *Start* v. *INS*, *supra*. See 8 F.3d at 703; note 14, *supra*.[15] Then, in a concurring opinion joined in relevant part by all members of the panel (see *id.* at 703 n.1), Judge Rymer advanced a broader view of what acts of misconduct should be disregarded under

---

[14] The opinion in *Start* was subsequently withdrawn after the alien's petition for review was dismissed as moot. See *Start* v. *INS*, 862 F.2d 787 (9th Cir. 1988).

[15] The *Casem* panel also called the BIA's attention to *Braun* v. *INS*, 992 F.2d 1016 (9th Cir. 1993). See 8 F.3d at 703. There, the court reversed a BIA decision that had noted that the alien not only had committed fraud in entering the country, but also had pursued an elaborate plan to have his first wife join him in the United States after he had entered the country based on the fraudulent representation that he was lawfully married to another woman who was a United States citizen. The court held that the BIA abused its discretion in considering the fraud at the time of entry and disagreed with the BIA's determination that the alien had pursued a fraudulent plan to facilitate his wife's entry. 992 F.2d at 1019-1020.

the Board's practice of not considering the alien's fraud or misrepresentation at the time of entry. The concurring opinion expressed the view that the BIA had erred when it considered, as an adverse factor, the fact that the alien, subsequent to her own entry based on a misrepresentation that she was unmarried, had submitted a visa petition on behalf of her husband that contained misrepresentations regarding the date of their marriage. See *id.* at 704. That approach, the concurrence concluded, amounted to a further consideration of the alien's own initial fraudulent entry.

In *Delmundo* v. *INS*, 43 F.3d 436 (1994), the Ninth Circuit extended still further its view of what conduct should be disregarded along with the fraud the alien committed at the time of entry. In *Delmundo*, the court held that virtually any post-entry fraud undertaken by an alien to preserve the immigrant status obtained through the alien's initial fraud is immune from consideration, so that "misrepresentations made to obtain items necessary to live and work"—in that case, a driver's license, social security card, and voter identification card—"may not be held against" the waiver applicant. *Id.* at 441.

In the instant case, the Ninth Circuit applied the same judicial extension of the initial-entry-fraud rule to prohibit the BIA from considering respondent's continuing course of serious immigration fraud—including his fraudulent application for naturalization as a United States citizen four years after his initial fraudulent entry—because, in the court's view, it "must be considered an extension of the initial fraud." Pet. App. 2a-3a.[16] Finally, in *Alquisalas* v. *INS*, 61

[16] Both in respondent's case and in *Delmundo*, the court of appeals remanded to the BIA for a reweighing of the equities,

F.3d 722 (1995), the Ninth Circuit appeared to recognize the extent to which its recent decisions had encroached upon the broad discretion accorded the Attorney General to deny a waiver under Section 241(a)(1)(H) and to decline to reopen a case for that purpose. *Id.* at 724. The court nonetheless reversed the BIA's determination under "the compulsion of" the circuit precedent of *Braun*, *Delmundo*, and *Yang*. *Id.* at 723.

3. This Court, of course, is under no similar compulsion to follow the Ninth Circuit's precedents that broaden the BIA's initial-entry-fraud rule, and it should not do so. As we have explained above (see pages 27-30, *supra*), it is for the Attorney General, not the courts, to determine which aspects of the alien's character and conduct will be considered, and which will not, in deciding whether to grant a discretionary waiver of deportation. The Board's approach in this and similar cases reflects a sound and long-standing exercise of the Attorney General's remedial discretion in that regard. It provides for a general consideration of positive and negative fac-

but limited to considering as an adverse factor, in each case, the fact that the alien apparently lied to the immigration judge in the course of the deportation proceedings under review. Pet. App. 3a-4a; *Delmundo*, 43 F.3d at 442. The court of appeals provided no explanation, however, for its implicit determination that lying to an immigration judge may be counted against an alien in balancing the equities under the court's version of the initial-entry-fraud rule, but lying to the INS or to other governmental authorities (such as motor vehicle or Social Security officials) about the same matters may not be. Moreover, in this case, the court disregarded the fact that respondent necessarily committed fraud on a court, because he could not otherwise have obtained his fraudulent divorces and remarried his wife under an assumed name.

tors bearing on the alien's suitability for continued permanent residence status, while carving out from consideration only the fraud or misrepresentation at the time of the alien's initial entry. Although the Board was not required to carve out even that exception (see pages 24, 29, *supra*), the Board could reasonably choose to do so, because it is the initial-entry fraud that is both the relevant ground for deportation and the very subject of the waiver determination under the narrowly focused terms of Section 241(a)(1)(H). In this sense, the Board could conclude, its approach follows the "pattern of the Act." Compare *Shepard* v. *NLRB*, 459 U.S. 344, 351 (1983).

By contrast, the court of appeals' open-ended extension of the initial-entry-fraud rule is inconsistent with an even-handed and reasonable application of Section 241(a)(1)(H). The court's approach places an alien who obtains his initial entry by fraud, and then commits a series of further fraudulent acts to preserve his illegally obtained status, in a better position than an alien who enters the country by lawful means, but later embarks on a similar series of fraudulent acts in an attempt to remain here. The alien who entered by fraud would, under the Ninth Circuit rule, have all of his frauds ignored in evaluating his request for a waiver of deportation under Section 241(a)(1)(H). The alien who entered lawfully, however, would have each of the frauds in the series weighed against him if he seeks discretionary relief, such as that available under Section 212(c) of the Act, 8 U.S.C. 1182(c). That cannot be the result that Congress intended in providing for a limited, discretionary waiver of deportation in certain cases of entry fraud. By contrast, the Board's rule

strikes a reasonable balance between forgiving the fraud at which Section 241(a)(1)(H) is directed, while at the same time not ignoring other serious misconduct by the alien that weighs against an award of special discretionary relief.

4. The Board did not abuse its discretion in applying its initial-entry-fraud rule in this case. The Board found that respondent "engaged in a pattern of violating this country's immigration laws through fraud." Pet. App. 10a. In accordance with the rule of *Alonzo* and *Da Silva*, the Board did not weigh as an adverse factor the fraud committed by respondent at the time of his initial entry into the United States, but reasonably weighed respondent's other acts of fraud against him. *Id.* at 10a-11a.

In the court of appeals, respondent himself recognized that his fraudulent naturalization application was distinct from his initial-entry fraud and could be properly considered as an adverse factor for Section 241(a)(1)(H) purposes. See Resp. C.A. Br. 4 ("The one and only adverse factor is the fraud associated with the naturalization interview."). Respondent acknowledged that "[w]hat is required" in his case "is a balancing of his fraudulent misrepresentation at the naturalization interview against the social and humane considerations." *Id.* at 6. There accordingly was no basis for the court of appeals to treat respondent's naturalization fraud as a mere extension of his initial-entry fraud. Pet. App. 2a-3a.

Moreover, to require the Attorney General to ignore respondent's fraudulent naturalization application would not only interfere with the Attorney General's exercise of her statutory discretion, but also would lead to the forgiveness of a fraud that is more significant than the initial-entry fraud at which

Section 241(a)(1)(H) is directed. Fraud in an application for naturalization as a United States citizen normally is a sufficient basis for revocation of citizenship, see 8 U.S.C. 1451; *Kungys* v. *United States*, 485 U.S. 759 (1988), which "[i]n its consequences * * * is more serious than a taking of one's property, or the imposition of a fine or other penalty. For it is safe to assert that nowhere in the world today is the right of citizenship of greater worth to an individual than it is in this country. It would be difficult to exaggerate its value and importance." *Schneiderman* v. *United States*, 320 U.S. 118, 122 (1943). Yet, under the court of appeals' approach, respondent's filing of a fraudulent naturalization application in 1982 in an attempt to obtain full citizenship would be treated as if it were subsumed by his unlawful entry by fraud in 1978. The Attorney General's approach reasonably refuses to treat fraud in obtaining the greater benefit as a mere "extension" of the fraud in obtaining the lesser.[17]

[17] The court of appeals' decision in this case could potentially affect the ability of the Attorney General to consider respondent's pattern of post-entry fraud, including his fraudulent naturalization petition, for purposes of acting on the naturalization petition itself. Under Section 340 of the INA, 8 U.S.C. 1451, the Attorney General has exclusive jurisdiction to grant petitions for naturalization. The BIA has previously decided, in another context, that a waiver of deportation under Section 241(a)(1)(H) also "waive[s] the underlying fraud," effectively erasing the initial illegality and causing the recipient of the waiver to be treated as a lawful permanent resident from the time of entry. *In re Sosa-Hernandez*, BIA Interim Dec. No. 3214 (Nov. 12, 1993); *In re Manchisi*, 12 I. & N. Dec. 132 (BIA 1967). We believe that the Attorney General should be able to conclude, in a case like respondent's, that an alien to whom she has been forced to grant a waiver of deportation under a judicial extension of the initial-entry-fraud rule nonetheless has not displayed the "good moral character" required for naturalization as a citizen. 8 U.S.C. 1427(a); see also 8 U.S.C. 1427(d) and (e). But if the Attorney General may rely on evidence so central to an alien's moral character in denying naturalization, it is difficult to see why she may not consider the same evidence in deciding whether to allow the same alien to remain in the country.

The Board's consideration of respondent's participation in his wife's fraudulent entry as an adverse factor when making its Section 241(a)(1)(H) decision also did not constitute an abuse of discretion. Respondent's participation in a fraudulent divorce in Taiwan and his provision of $60,000 to his wife for her to buy a false United States citizen identity enabled his wife to enter the United States unlawfully without detection. His wife thereby obtained the substantial benefits that arise out of residence in this country and her status was not dependent on respondent's own subsequent fraudulent entry. The fact that respondent thereafter obtained his own unlawful entry into this country based on a remarriage to his wife under her false American identity does not diminish the seriousness of the independent and separate fraud that he and his wife already had committed to facilitate her entry. The Board's treatment of respondent's participation in the earlier fraud as separate from his own fraud in connection with his own entry is entirely reasonable and consistent with the Board's view of the scope and rationale of its initial-entry-fraud rule.

The Ninth Circuit's radical extension of the Board's rule, by contrast, confers a derivative immunity on an alien against consideration of all subsequent acts of fraud or misrepresentation that, in the court's view, are necessary to maintain a false

identity in the United States, as well as acts of fraud and misrepresentation that preceded the alien's own entry. The result of the Ninth Circuit's decisions is to transform Section 241(a)(1)(H) from a provision designed to "waive relatively minor grounds for deportation" into the very sort of "charter of amnesty" that Congress sought to eliminate when it amended that provision in 1981 and committed the granting of relief to the judgment and discretion of the Attorney General. See H.R. Rep. No. 264, *supra*, at 25.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
BETH S. BRINKMANN
Assistant to the Solicitor General
THOMAS W. HUSSEY
NORAH ASCOLI SCHWARZ
Attorneys

MAY 1996

APPENDIX

1. Section 212 of the Immigration and Nationality Act (INA), 8 U.S.C. 1182, provides in pertinent part:

§ 1182. Excludable aliens

(a) Classes of excludable aliens

Except as otherwise provided in this chapter, the following describes classes of excludable aliens who are ineligible to receive visas and who shall be excluded from admission into the United States:

* * * * *

(5) Labor certification and qualifications for certain immigrants

(A) Labor certification

(i) In general

Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is excludable, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that—

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the

time of application for a visa and admission to the Untied States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

* * * * *

(6) Illegal entrants and immigration violators

* * * * *

(C) Misrepresentation

(i) In general

Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or entry into the United States or other benefit provided under this chapter is excludable.

(ii) Waiver authorized

For provision authorizing waiver of clause (i), see subsection (i) of this section.

* * * * *

(7) Documentation requirements

(A) Immigrants

(i) In general

Except as otherwise specifically provided in this chapter, any immigrant at the time of application for admission—

(I) Who is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by this chapter, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality if such document is required under the regulations issued by the Attorney General under section 1181(a) of this title, * * *

* * * * *

is excludable.

* * * * *

(*i*) Admission of immigrant excludable for fraud or willful misrepresentation of material fact

The Attorney General may, in his discretion, waive application of clause (i) of subsection (a)(6)(C) of this section—

(1) in the case of an immigrant who is the spouse, parent, or son or daughter of a United States citizen or of an immigrant lawfully admitted for permanent residence, or

(2) if the fraud or misrepresentation occurred at least 10 years before the date of the immigrant's application for a visa, entry, or adjustment of status and it is established to the satisfaction of the Attorney General that the admission to the United States of such immigrant would not be contrary to the national welfare, safety, or security of the United States.

* * * * *

2. Section 241(a)(1) of the INA, 8 U.S.C. 1251(a)(1), provides in relevant part:

§ 1251. Deportable aliens

(a) Classes of deportable aliens

Any alien (including an alien crewman) in the United States shall, upon the order of the Attorney General, be deported if the alien is within one or more of the following classes of deportable aliens:

(1) Excludable at time of entry or of adjustment of status or violates status

(A) Excludable aliens

Any alien who at the time of entry or adjustment of status was within one or more of the classes of aliens excludable by the law existing at such time is deportable.

* * * * *

(H) Waiver authorized for certain misrepresentations

The provisions of this paragraph relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as aliens described in section 1182(a)(6)(C)(i) of this title, whether willful or innocent, may, in the discretion of the Attorney General, be waived for any alien (other than an alien described in paragraph (4)(D) [relating to certain aliens who assisted in Nazi persecution or engaged in genocide]) who—

(i) is the spouse, parent, son, or daughter of a citizen of the United States or of an alien lawfully admitted to the United States for permanent residence; and

(ii) was in possession of an immigrant visa or equivalent document and was otherwise admissible to the United States at the time of such entry except for those grounds of inadmissibility specified under paragraphs (5)(A) and (7)(A) of section 1182(a) of this title [relating to possession of valid labor certifications and immigrant visas, respectively] which were a direct result of that fraud or misrepresentation.

A waiver of deportation for fraud or misrepresentation granted under this subparagraph shall also operate to waive deportation based on the grounds of inadmissibility at entry directly resulting from such fraud or misrepresentation.

* * * * *

3. Former Sections 212(a)(14), (19) and (20) of the INA, 8 U.S.C. 1182(a)(14), (19) and (20) (1988), which were the predecessors to Sections 212(a)(5), (6)(C) and (7)(A), provided:

§ 1182. Excludable aliens

(a) General classes

Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

* * * * *

(14) Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that (A) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of aliens who are members of the teaching profession or who have exceptional ability in the sciences or the arts), and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed. The exclusion of aliens under this paragraph shall apply to preference immigrant aliens described in section 1153(a)(3) and (6) of this title, and to nonpreference immigrant aliens described in section 1153(a)(7) of this title;

* * * * *

(19) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure, or has sought to procure or has procured, a visa, other documentation, or entry into the United States or other benefit provided under this chapter;

(20) Except as otherwise specifically provided in this chapter, any immigrant who at the

time of application for admission is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by this chapter, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality, if such document is required under the regulations issued by the Attorney General pursuant to section 1181(a) of this title;

* * * * *

4. Former Sections 241(a)(1) and (f) of the INA, 8 U.S.C. 1251(a)(1) and (f) (1988), which were the predecessors to Sections 241(a)(1)(A) and (H), provided, in relevant part:

§ 1251. Deportable aliens

(a) General classes

Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;

* * * * *

(f) Discretion of Attorney General to waive deportation for fraudulent entry in specified cases

(1)(A) The provisions of this section relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as aliens who have sought to procure or have procured visas or other documentation, or entry into the United States, by fraud or misrepresentation, whether willful or innocent, may, in the discretion of the Attorney General, be waived for any alien (other than an alien described in subsection (a)(19) of this section [relating to certain aliens who assisted in Nazi persecution or engaged in genocide]) who—

(i) is the spouse, parent, or child of a citizen of the United States or of an alien lawfully admitted to the United States for permanent residence; and

(ii) was in possession of an immigrant visa or equivalent document and was otherwise admissible to the United States at the time of such entry except for those grounds of inadmissibility specified under paragraphs (14), (20), and (21) of section 1182(a) of this title which were a direct result of that fraud or misrepresentation.

(B) A waiver of deportation for fraud or misrepresentation granted under subparagraph (A) shall also operate to waive deportation based

on the grounds of inadmissibility at entry described under subparagraph (A)(ii) directly resulting from such fraud or misrepresentation.

* * * * *